No. 425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

WALLS MANUFACTURING CO., INC.

vs.

NATIONAL LABOR RELATIONS BOARD

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the District Of Columbia

JOHN EDWARD PRICE
JAMES HENLEY MORGAN
JOHN BERNARD NELSON
CHARLES L. MORGAN
Attorneys for Petitioner
500 Equitable Savings Bldg.
811 Lamar Street
Fort Worth, Texas
ED 2-5251

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	
I. Jurisdiction in the Court of First Instance	3
II. Facts	3
Decisions Below	7
Specification of Errors to be Urged	8
Reasons for Granting the Writ	8
Conclusion	21
Certificate of Service	22
Appendix A—Opinion Below	23
Appendix B—Applicable Statutes	27
Appendix C—Opinion Below in Related Case	30

CITATIONS

Cases:

Albrecht v. NLRB, 181 F2d 652 (CA 7)	15
Auto Workers v. Wisconsin Board, 336 U.S. 245	13
Hornischfeger Corp., 9 NLRB 676	14
Joanna Cotton Mills Co. v. NLRB, 176 F2d 749 (CA 4)	15
Labor Board v. Fansteel Corp., 306 U.S. 240	13
Labor Board v. Jones & Laughlin, 301 U.S. 1	13
Maryland Drydock Company v. NLRB, 183 F2d 538 (CA 4)	15
NLRB v. Bluebell Inc., 219 F2d 796 (CA 5)	15
NLRB v. Local Union 1229, IBEW, (Jefferson Standard Broadcasting Company), 346 U.S. 464	13, 14, 15
NLRB v. Longview Furniture Co., 206 F2d 274 (CA 4)	15
NLRB v. McGahey, 233 F2d 406 (CA 5)	13
NLRB v. Office Towel Supply Co., Inc., 201 F2d 838 (CA 2)	17

CITATIONS (Continued)

Page

NLRB v. Reynolds International Pen Company, 162 F2d 680 (CA 7) 15
NLRB v. Shen-Valley Meat Packers, Inc., 211 F2d 289 (CA 4) 18
NLRB v. Sunset Minerals, Inc., 211 F2d 224 (CA 9) 18
NLRB v. Tennessee Coach Co., 191 F2d 546 (CA 6) 13
NLRB v. Washington Aluminum Co., 370 U.S. 9 ..... 15, 16
NLRB v. Westinghouse Electric Corp., 179 F2d 507 (CA 7) 18

Progressive Mine Workers v. NLRB, 187 F2d 289 (CA 7) 18

Universal Camera Corp. v. NLRB, 340 U.S. 474 ..... 18, 19

Wyman-Gordon v. NLRB, 153 F2d 480 (CA 7) 11, 12, 13

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.)
Section 7 ..... 9, 10, 17, 27
Section 8(a)(1) 27
Section 10(c) 9, 10, 16, 27
Section 10(e) 28
Section 10(f) 28

Jurisdiction and venue of the Supreme Court of the United States (28 U.S.C. 1254) 28

Miscellaneous:

H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-39 (1947) 10
H. R. Rep. No. 510, 80th Cong., 1st Sess. 39, 55 (1947) 10, 11
H. R. 3020, Sec. 12, in Legislative History of the Labor Management Relations Act, pp. 204, 207 10

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

WALES MANUFACTURING CO., INC.

vs.

NATIONAL LABOR RELATIONS BOARD

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the District Of Columbia

Your petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 6, 1963 (printed in full as Appendix A to this Petition), which enforced an order of the National Labor Relations Board (hereinafter called the Board) requiring reinstatement with back pay of a discharged employee and other affirmative relief.

Opinion Below

The opinion of the court below (Appendix A herein) has not yet been officially reported. The Board's decision and order (JA 183-185)[1] is reported as 128 NLRB No. 60. A previous opinion of the court below

[1]JA refers to joint appendix. References preceding a semicolon are to the Trial Examiner's Intermediate Report; succeeding references are to the supporting evidence.

reversing and remanding the Board's decision and order, supra, is reported at 112 App. D. C. 30, 299 F2d 114. The Board's supplementary decision and order (JA 186-194) is reported as 137 NLRB No. 134.

Jurisdiction

The judgment of the court below was entered on June 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended (Appendix B).

Question Presented

Whether the court below properly upheld the Board in finding that an employee who wrote a letter containing false statments concerning her employer to the State Department of Health and was discharged by the employer for that act was entitled to reinstatement and back pay under Sections 7, 8, and 10 of the National Labor Relations Act, as amended.

Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended (hereinafter called "the Act"), (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.), are set forth in Appendix B herein.

Statement of the Case

I. Jurisdiction in the Court of First Instance.

Petitioner is a company incorporated under the laws of the State of Texas and a party aggrieved by an order of the Board and was granted review below under Section 10(f) of the Act.

II. Facts

In the latter part of May, 1958, Henrietta LeDanois, an employee at petitioner's Cleburne, Texas plant complained to production manager Pou that the restroom was dirty, emphasizing primarily the employees' failure to use the boxes provided for trash (JA 47). As she later testified, "I didn't think it (the condition) was the Company's fault. I thought it was the employees' fault" (JA 49).

Responsive to this limited complaint, petitioner's plant manager and production manager reviewed the larger question of restroom facility needs (JA 148). On June 4, 1958, petitioner's Board of Directors authorized and initiated the renovation of the existing women's restroom facilities and the new construction of additional facilities at its Cleburne, Texas plant (JA 173; 148, 149, 150). Work began on the new restroom in late July (JA 173; 24, 51, 150). The old one was remodeled and enlarged and both were equipped with covered trash cans in each commode stall (JA 173; 47, 54, 55, 94, 125). LeDanois, who was called as a witness for the General Counsel of the Board, testified that she was "very satisfied"

with the condition of the restrooms after the improvements were made (JA 89).

Apparently unaware of the company's plans to improve the restrooms, several of petitioner's women employees "discussed" among themselves in June of 1958 the same general deficiencies which petitioner already had commenced action to correct (JA 14, 60). Choosing not to inform the company of her complaint, Mary Akey, on July 2, 1958, wrote a letter to the State Department of Health about the "unhealthy and unsanitary condition" in the plant (JA 165). The letter stated, *inter alia*, that the writer was acting at the request of several employees and requested that her authorship be kept confidential. The only specific complaints made in this letter were the unclean condition of the restroom and its "intense heat" (JA 165).

Akey's letter was forwarded to Dr. Yater, the County Health Officer, who notified the company that a complaint had been made (JA 92). At no time did Dr. Yater show Akey's letter to officials of the company, nor did he reveal the name of Akey as its author (JA 96). Indeed, the company was first made aware of the contents of this letter at the Board hearing (JA 172; 150-151). Dr. Yater inspected the plant in late July or early August and later stated that it "was in very good condition" and that the company had "made all the corrections and were cooperative in every way" (JA 94-95). Akey, herself, admitted (JA 104):

> "The company corrected all the sanitary con-

ditions which I brought to the attention of the Department of Health in my letter of July 2, 1958, except that no heating facilities at all were provided in either of the two restrooms."

On January 6, 1959, after construction of a new rest room and complete renovation of the old, Akey again wrote the State Department of Health concerning the "sanitary conditions" at Walls (JA 173; 166-167):

"Your letter of July 16, 1958, in answer to mine in regards to above subject.

I believe that Walls have had ample time to make an effort to correct the unsanitary conditions now existing in this establishment. However, little has been done in that direction.

Walls only action was to build a toilet. There are no heating facilities in the toilet, and recently the temperature was below freezing in this toilet.

There are no covered disposal receptacles for lunch sacks, etc. There is no sanitary place for employees to eat their lunch. The toilet is cleaned once each week. No hot water, no dressing rooms.

There (are) approximately two hundred (200) females working in this plant, and it is apparent that Walls is financially equipped to comply with Occupational Health Regulation No. 2."

Yours truly,
Mrs. Mary Akey,

On this occasion, the letter was forwarded to the City Health Officer, Dr. O. T. Smith, Jr., who inspected the plant and concluded that it met the stand-

ards set forth in Health Regulation No. 2 (JA 97, 98). During his visit to the plant, Dr. Smith showed Akey's January 6 letter to officials of the company (JA 99). On January 13, Dr. Smith wrote the State Department of Health that the company was in compliance with the regulations and a copy of his letter was sent to Walls (JA 175).

At the close of work on January 14, Vice President Finnell called Akey to the office and in the presence of his assistant, Hazel Whitt, and of Akey's immediate supervisor, Clara Nickell, discharged Akey (JA 176). When Akey asked the reason, Finnell told her that (JA 152):

> "Aparently she wasn't satisfied with our facilities and it didn't look like she was ever going to be and she had written a letter to the Health Department in Austin in which she had made some statements that were certainly not true and we just couldn't stand for that kind of business at all."

Akey admitted that she had writen the letter but told Finnell that she had written it "for" others as well as herself (JA 153). When Finnell asked Akey to name others, she refused (JA 153). According to Akey, Finnell also pointed out that the factory had been inspected twice and approved both times (JA 33).

Decisions Below

In the initial proceeding underlying the present case, the Trial Examiner found that the discharged employee "had removed herself from the protection of the Act" and that Petitioner "had no reason to believe that Akey's letter writing activity was for or on behalf of anyone other than herself" (JA 181).

In its decision and order, the Board also found that petitioner had not violated Sec. 8(a)1 of the Act by reason of an absence of knowledge of any concerted aspect to the letter writing activity, but the Board failed to reach the question of whether the activity was "protected" under the Act. 128 NLRB No. 60 (JA 184-185).

On appeal brought by the International Ladies' Garment Workers' Union, AFL-CIO, the case was remanded to the Board for further consideration of the question of employer knowledge and for determination of whether the activity was within the protection of the Act. 112 App. D.C. 30, 299 F2d 114.

By a supplementary decision and order, the Board, upon reconsideration, reversed its orginal ruling with respect to violation of Section 8(a)1 and found that the employer did have knowledge and that the activity was "protected" by the Act. 137 NLRB No. 134 (JA 188-190).

Upon appeal brought by your petitioner, the court below adopted the finding of the Board's supplementary decision and order and ordered its enforcement (Appendix A herein).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

I. In holding that the writing by an employee of an untruthful letter concerning her employer's sanitary facilities to the State Department of Health was a concerted and protected activity within the meaning of Section 7 of the Act and in failing to hold that the discharge of that employee was "for cause" within the meaning of Sec. 10(c) of the Act.

II. In adopting a finding of the Board attributing to an employer knowledge of a concerted nature of an employee's letter writing activity upon grounds which have no evidentary basis, and which, therefore, was in conflict with the rule requiring that a finding of the Board must be supported by substantial evidence considering the record as a whole.

REASONS FOR GRANTING THE WRIT

Point of Error I Restated:

The Court below erred in holding that the writing by an employee of an untruthful letter concerning her employer's sanitary facilities to the State Department of Health was a concerted and protected activity within the meaning of Section 7 of the Act and in failing to hold that the discharge of that employee was "for cause" within the meaning of Sec. 10(c) of the Act.

In our national industrial society, the right of an employer to hire and discharge his employees is just as vital as the employees' right to be free from interference when engaging in concerted activities. The problem of balancing these rights is a recurring one and is of fundamental importance in the operation of the statute. Because of the manifest importance of the question and because, as we will show, the holding below is in conflict with decisions of this Court and courts of appeals, the issue should be authoritatively resolved.

Petitioner's managerial decision to discharge Akey for writing a letter containing false statements about her employer was consistent with the expressed intent of Congress and decisions of this Court as well as decisions of the courts of appeals with respect to the meaning and effect of both Section 7 and Section 10(c) of the Act. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 10(c)[2] prohibits the Board from requiring "the reinstatement of any individual as an employee who has been suspended or discharged for cause" (Appendix B).

Congress considered the language of Section 10(c) of the Act against a background of some confusion over whether certain specific acts of employees were of sufficient seriousness as to warrant the denial of the employees' reinstatement. Under these circum-

[2]The court below failed to make a finding on the effect of Section 10(c) of the Act although it was one of two stipulated issues upon which the hearing below was held (JA 204).

stances Congress adopted the specific language quoted above in Section 10(c).

The House, in considering the 1947 amendments to the Wagner Act, originally passed a provision expressly withdrawing statutory protection from certain enumerated concerted activities. H. R. 3020, Sec. 12, in Legislative History of the Labor-Management Relations Act, 1947, pp. 204-207. The House Conference Committee succeeded in persuading the House to eliminate this provision and to accept the text of Section 7 as proposed by the Senate on grounds, *inter alia*, that the inclusion of such a provision might have a limiting effect and make improper conduct, not specifically mentioned, subject to the protection of the Act. H. Rep. No. 510, 80th Cong., 1st Sess., p. 38 (see also 336 U.S. at pp. 260-263). The report of the conference committee included discussions of the statutory language quoted above in its comments concerning both Sections 7 and 10(c) of the Act. (H.R. Rep. No. 510, *Supra*, at 39, 55):

> . . . "In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the Act, and to the

extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in Section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity . . . ."

"(10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatment or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatment or back pay for any individual who was suspended or discharged for cause. Thus, employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon v. NLRB*, 153 F2d 480), will not be entitled to reinstatment. The effect of this provision is also discussed in connection with the discusion of section 7."

As an example of prohibited reinstatment orders, the Conference Committee chose to single out the *Wyman-Gordon* case, supra, wherein the opinion (with its accompanying footnote) states:

> "The Board, in response to petitioner's contention that Baker's union activities interrupted production, makes the astounding denial that "Baker's union activities caused a serious interruption of production." In other words, the Board appears to concede that Baker caused some interruption but that it was not serious.[1]
>
> [1]The Board in it's brief, in response to petitioner's argument that Baker's misconduct was "outstanding", as found by the Trial Examiner, and in support of it's contention that his discharge was discriminatory, argues that his conduct did not "seriously" interfere with the work of other employees, that his interference did not cause a "serious" loss of production, that he did not cause "undue" spoilage of materials, and that petitioner did not prove that Baker was "enormously" delinquent. We think this argument is without substance and must be rejected."

In the present case, in response to the petitioner's argument that "Akey's January 6 letter contained misleading statements, if not deliberate untruths, and when considered in the light of Respondent's action to improve and correct its sanitation facilities some 5 months previously, was only calculated to heap embarrassment upon Respondent," as found by the Trial Examiner (JA 181), the court below adopted the Board's findings that "There was no cogent evidence that the allegations were made with intent to falsify . . . or that they were *manifestly* destructive of discipline" and that, "*notwithstanding the inaccuracy* of any allegation, the activity was protected conduct within the meaning of Section 7 of the Act (emphasis added)." (see Appendix A).

Six years after enactment of the Taft-Hartley amendments, this Honorable Court in *NLRB v. Local Union 1229, IBEW, (Jefferson Standard Broadcasting Company)*, 346 U.S. 464, reversed the holding of the Court of Appeals for the District of Columbia Circuit that to avoid protection of Section 7 of the Act a concerted activity must be unlawful and found that the publication of hand bills attacking the quality of an employer's product, but containing no reference to a labor controversy, was not a protected activity within the meaning of Section 7 of the Act. In so holding, this Court affirmed that the "for cause" language amending Section 10(c) was declaratory of an implied limitation which this Court had previously recognized in Section 7. *Labor Board v. Jones & Laughlin*, 301 U.S. 1; *Labor Board v. Fansteel Corp.*, 306 U.S. 240; *Auto Workers v. Wisconsin Board*, 336 U.S. 245. Since the *Jefferson Standard Broadcasting Company* case, supra, courts of appeals have held that an employer may discharge an employee for good cause or bad cause, so long as such cause is not merely a pretext to circumvent prohibitions of the Act toward organizational activities. *NLRB v. Tennessee Coach Co.*, 191 F2d 546 (CA 6); *NLRB v. McGahey*, 233 F2d 406 (CA 5).

In the *Wyman-Gordon* case, supra, cited by the Conference Committee Report, the Board had projected the circular argument that an employee's discharge was proof of an anti-union animus which caused the discharge. In the present case this difficulty is not present because the Board has long since abandoned it's

original charges under Section 8(a)(3). That legal obstacle was also obviated in the *Jefferson Standard Broadcasting Company* case, supra, wherein it was clear and undisputed that a group of employees was acting in concert for a valid objective, namely, an increase in wages. This Court there held that the means chosen by employees to implement attainment of their objective was such an act of disloyalty as to remove the activity from beneath the mantle of protection of Section 7 of the Act and announced the doctrine of "indefensible conduct" suggested 13 years earlier by the Board in *Harnischfeger Corp.*, 9 NLRB 676.

In the *Jefferson Standard Broadcasting Company* case, supra, the disloyalty of the employees was manifested by the publication of a series of derogatory, but essentially truthful, statements concerning their employer's shortcomings in the operation of the business wherein they held employment. The object was to harrass and embarrass an employer in areas foreign to the arena of the actual dispute and thus gain concessions from the consequent wounds. The facts in the present case differ from the facts in the *Jefferson Standard Broadcasting Company* case, supra, in that an employee published untruthful statements which could serve no valid objective except, as the trial examiner found, "to heap public embarrassment" upon her employer (JA 181).

The decision below is in direct conflict with the Court's decision in the *Jefferson Standard Broadcasting Company* case in that it condones an overt and injurious act of disloyalty which could have no pro-

tected purpose since the employee daily enjoyed the facilities and services which she falsely and knowingly claimed were absent.

The decision below is in conflict not only with this Court's *Jefferson Standard Broadcasting Company* decision, supra, but also with *Maryland Drydock Company v. National Labor Relations Board*, 183 F 2d 538 (CA 4) (circulation of literature "insulting to those in charge of management and destructive of discipline"); *Albrecht v. NLRB*, 181 F 2d 652 (CA 7) (involving a concerted refusal of supervisors, employees under the controlling Wagner Act, to perform the work of strikers to protect the plant); *Joanna Cotton Mills Co. v. NLRB*, 176 F 2d 749 (CA 4) (ciculation of petition calling for the removal of supervisory employee); *NLRB v. Reynolds International Pen Company*, 162 F 2d 680 (CA 7) (concerted walkout to protest promotion of foreman); *NLRB v. Bluebell Inc.*, 219 F 2d 796 (CA 5) (falsely marking unrepaired goods as "repaired"); *NLRB v. Longview Furniture Co.*, 206 F 2d 274 (CA 4) (use by pickets of profane language to disuade non-strikers from working; court pointed out that the privilege to engage in concerted activity could no more infringe the rights of other employees than the rights of an employer).

Recently, this Court again considered the complementarity of Sections 7 and 10(c) in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9. In that case a group of workers who had previously complained about the cold working conditions to the company's foreman left their place of employment in a group

when working conditions became so bitterly cold that the company's own foreman expressed the opinion that the men should go home.

In complete accord with previous decisions, this Court there held that the employer's pretext of a rule against leaving work could not, under the circumstances, alter the nature of the protest or the accuracy of its stated reason and relieve the employer of responsibilities imposed by the Act. The *Washington Aluminum* case might have been somewhat analagous to the present case if the stated reason for the walkout had not actually existed; i.e. if the temperature outside had actually been a balmy seventy degrees. In the present case, the onus of "inaccuracy" is not on the employer, but on the employee.

Thus, the decision of the court below is in conflict with the intent of Congress in enacting the statute and the authoritative decisions of this Court and the courts of appeals interpreting it. Petitioner submits that the discharge of Akey in this case for writing a letter containing false statements concerning petitioner was a discharge "for cause" within the meaning of Section 10(c) of the Act. A holding to the contrary deprives Section 10(c) of any real substance.

Point II Restated:

The Court below erred in adopting a finding of the Board attributing to an employer knowledge of a concerted nature of an employee's letter writing activity upon grounds which have no evidentiary basis, and which, therefore, was in conflict with the rule requiring that a finding of the Board must be supported by substantial evidence considering the record as a whole.

Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This Court has never determined whether or not employer knowledge of the concerted nature of the activity prompting the discharge is a necessary element in finding a violation of Section 7, but the courts of appeals have considered knowledge to be a necessary element.

The Court of Appeals for the Second Circuit has held that an employer did not violate Section 7 by discharging an employee who remarked "Oh, this is a hell of a place to work," even though the remarks were made in a discussion with others over the need for a union since the employer did not know of such discussions at the time of the discharge. *NLRB v. Office Towel Supply Co., Inc.* 201 F 2d 838 (CA 2). In that decision the Court stated "doubtless employee's remarks which otherwise would justify discharge, may be made in a context of concerted activity with the result that the discharge of that employee for that

remark is unlawful under the Act—providing the employer knows of that context at the time of the discharge, but not otherwise." Likewise, the Court of Appeals for the Fourth Circuit has held that a finding that an employer violated the Act was not supported where there was no direct evidence that the employer knew of this activity. *NLRB v. Shen-Valley Meat Packers Inc.*, 211 F 2d 289 (CA 4). The Sixth Circuit has held that the concerted nature of an employee's activities was no defense where there was no evidence that the discharging foreman knew of the employee's participation in such activities. *NLRB v. Westinghouse Electric Corp.*, 179 F 2d 507 (CA 6). This principal has likewise been upheld in the 7th and 9th Circuits. *Progressive Mine Workers v. NLRB*, 187 F 2d 289 (CA 7); *NLRB v. Sunset Minerals Inc.*, 211 F 2d 224 (CA 9).

This Court has approved and adopted the standard set up by the Congress in requiring that findings of the Board must be supported by substantial evidence upon the record considered as a whole in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, and therein stated:

> ". . . The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference . . . to the 'whole record.' . . . (340 U.S. at p. 488)
>
> * * * * * * * * *
>
> ". . . This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (340 U.S. at p. 491.)

Petitioner submits that this case is one of those rare instances where the standard appears to have been grossly misapplied. Thus, the court below deferred to the Board's supplemental decision and order: "By that decision and order the Board concluded that it was satisfied from the evidence, assuming the need for showing knowledge of the offense at the time of the discharge, that at the time of the discharge interview the Respondent knew of the concerted nature of [the employee's] activity." The Board's own determination on this point is found as a footnote to the Board's supplementary decision and order: "the fact that two other employees had approved Akey's letter was reported to Respondent immediately after its words of discharge of Akey had been uttered and before any other action was taken to effectuate the termination" (JA 188). *The difficulty is that no such statement is to be found anywhere in the evidence in this case.*

Both the Trial Examiner and the Board (in the original decision and order) found that the employer was without such knowledge (JA 181, 184-185, 187). The findings of the Trial Examiner are to be given some weight in considering the whole record, *Universal Camera Corp. v. NLRB*, *supra*. In its brief the present Petitioner pointed out to the court below that the record was completely devoid of any claim by any witness that such a statement had ever been made. (Brief for Petitioner pp. 31-32). The Board's reply brief declined to give evidential support for the purported statement but conjectured: "it is more than

likely that many of them (employees) would have been . . . not hesitant in joining into the concerted activity of discussing and approving . . . the . . . letter" (Brief for Board p. 7). On oral argument, Counsel for General Counsel admitted the Board's inability to find evidence supporting the supposed approval by two other employees, much less that such approval had ever been reported by the discharged employee to her employer. The substantial evidence standard has, therefore, been grossly misapplied if not completely ignored.

In view of the consistent findings in other circuits with respect to the necessity for employer's knowledge, the court below chose to avoid the issue by its decision, but if the question is thus avoided, the issue of its avoidance is perhaps more fundamental than the question itself. Knowledge has been imputed to an employer through specific words which the record fails to disclose. In this respect the question of whether or not an employer's knowledge of a concerted nature in an employee's activity is germain to the present case and is respectfully submitted as an important question now cast in doubt and worthy of this Court's consideration.

Conclusion

The issues presented are of substantial importance in the administration of the Act, and the decision below conflicts in principle and result with the decisions of this Court and courts of appeals. It is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN EDWARD PRICE
JAMES HENLEY MORGAN
JOHN BERNARD NELSON
CHARLES L. MORGAN
Attorneys for Petitioner,
Walls Manufacturing Co., Inc.
300 Equitable Savings Bldg.
811 Lamar Street
Fort Worth, Texas
ED 2-5251

Of Counsel:

Charles L. Morgan

Dated at Fort Worth, Texas
this day of

Certificate of Service

I, Charles L. Morgan, an attorney for Walls Manufacturing Co., Inc., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1963, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit on the several parties thereto as follows:

1. On the United States, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the National Labor Relations Board, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Mr. Arnold Ordman, Esq., its General Counsel, at the offices of the Board, Washington 25, D. C.

Charles L. Morgan
Attorney for
Walls Manufacturing Co., Inc.
300 Equitable Savings Bldg.
811 Lamar Street
Fort Worth, Texas

Appendix A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 17,267

WALLS MANUFACTURING COMPANY, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

On Petition to Review and Set Aside and on Cross Petition to Enforce an Order of the National Labor Relations Board after Proceedings Pursuant to Remand

Decided June 6, 1963

Mr. John Edward Price for petitioner.

Miss Marion L. Griffin, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Ohio, *pro hac vice*, by special leave of court, for respondent. *Messrs. Stuart Rothman*, General Counsel at the time of argument, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Allan I. Mendelsohn*, Attorney, National Labor Relations Board, were on the brief, for respondent. *Mr. Herman Levy*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before BASTIAN, BURGER and WRIGHT, Circuit Judges.

BASTIAN, *Circuit Judge:* This case was before the court on a prior occasion. See *International Ladies' Garment Workers' U. v. N.L.R.B.*, 112 U.S.App.D.C. 30, 299 F 2d 114 (1962). The facts are set forth in detail in that opinion; but, briefly, the charge against Walls Manufacturing Company, Inc. was that it had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging an employee, Mrs. Mary Akey. This court, in remanding the case to the Board, stated:

> "It will thus be seen that we agree with the Board's conclusion that Mrs. Akey's conduct with respect to the second letter was concerted activity, but disagree as to the manner in which the Board's general rule as to employer knowledge was applied. One further issue remains, however —whether Mrs. Akey's conduct with respect to that letter was 'protected,' a matter on which the Board expressly declined to rule. Whether an activity is protected or not depends not only on the wording and purposes of the Act, but on the precise nature and effect of the employee's conduct. The question is accordingly one for the Board to decide in the first instance, and we express no opinion on the subject at the present stage. No doubt, however, the Board will wish to consider whether Mrs. Akey's second letter contained false information, and, if so, whether the falsehoods were such as to remove the writing from any 'protected' status it might otherwise possess." 112 U.S.App.D.C. at 32, 299 F 2d at 116.

The Board reopened the case and, on re-examination of the record and evidence in the light of this court's

opinion, filed its supplemental decision and order. By that decision and order the Board concluded that it was satisfied from the evidence, assuming the need for showing knowledge of the offense at the time of discharge, that "at the time of the discharge interview the Respondent knew of the concerted nature of [the employee's] activity." The Board further found that there was "no cogent evidence that the allegations were made with intent to falsify or maliciously injure the Respondent, that they were defamatory or insulting in character, or that they were manifestly destructive of discipline." The Board concluded that, notwithstanding the inaccuracy of any allegation, the activity was protected conduct within the meaning of Section 7 of the Act.[1] Thereupon, the Board ordered petitioner to cease and desist from certain violations of the Act and to reinstate the employee with back pay, and other affirmative action.

Petition to review, set aside and reverse the supplemental decision and order was duly filed; and the Board answered, and prayed enforcement.

While the matter is not free from doubt, and we might well have reached a view contrary to that of the Board, we cannot say, having in mind the narrow

[1] 29 U.S.C. § 157 (1958): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

scope of our review, that the record as a whole does not support the Board's determination.

Accordingly, the petition for review will be denied, and the supplementary order will be enforced.

So ordered.

Appendix B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

Prevention of Unfair Labor Practices
Sec. 10.

* * * * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of

fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatment of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for cause. * * *

* * * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such

order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of Columbia, * * * the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * * *

28 U.S.C. Sec. 1254: Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

Appendix C

UNITED STATES COURT OF APPEALS

District of Columbia Circuit

No. 16,124

January 25, 1962.—(299 F. 2d 114.)

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

WASHINGTON, C. J.: This is a petition for review of a National Labor Relations Board order which dismissed a complaint by petitioner union. The union charged that Walls Manufacturing Company violated Section 8(a)(1) of the National Labor Relations Act, as amended,[1] by discharging an employee, Mrs. Mary Akey.[2]

The facts are not seriously disputed. In June, 1958, a number of women employees of Walls discussed among themselves the deficiencies of the ladies restroom at the plant. One employee, Mrs. Le Danois, complained to the production manager. As a result of the employee discussions, Mrs. Akey wrote a letter

[1] 61 Stat. 140, 29 U. S. C. § 158(a)(1). Section 8(a)(1) declares it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

[2] A violation of Section 8(a)(3) was also charged, but both the Trial Examiner and the Board concluded that the evidence did not support such an allegation. Petitioner no longer challenges this finding.

of complaint on July 2, 1958, to the Texas State Health Department. The letter stated that it was written at the request of several other employees. As a result of the letter, the county health officer got in touch with the employer, who then made a number of sanitary improvements. On January 6, 1959, however, Mrs. Akey again wrote the State Health Department concerning the "sanitary conditions" at Walls. This second letter, according to the testimony, was approved in advance by several other employees. It was forwarded to the city health officer, who visited the plant and concluded that it met the necessary health standards. While inspecting the plant premises, the health officer showed Mrs. Akey's January 6 letter to company officials, who said they suspected that Mrs. Akey had also made the earlier complaint. Two days later, on January 4, 1959, the vice president of the company called Mrs. Akey into his office and in the presence of two other persons told her that she was fired. Mrs. Akey asked the reason for termination. In response, the vice president told her, according to his testimony, that—

> "... apparently she wasn't satisfied with our facilities and it didn't look like she was ever going to be and she had written a letter to the Health Department in Austin in which she had made some statements that were certainly not true, and we just couldn't stand for that kind of business at all."

Mrs. Akey admitted that she had written the letter but told the vice president that she had written at

the request of others as well as herself. She refused to name the others.

On the basis of these facts, the Examiner found that the writing and sending of the January 6 letter was neither protected nor concerted activity within the meaning of Section 7 of the Act. Because the letter had been approved by two other employees, the Board disagreed and found that Mrs. Akey's conduct constituted concerted activity. It did not reach the question whether the activity was protected.[3] The Board held, however, that—

> "In order to sustain a finding of an 8( )(1) violation based on discharge, it is necessary to establish that at the time of the discharge the employer had knowledge of the concerted nature of the activity for which the employee was discharged."

The Board affirmed the Examiner's finding that when Walls discharged Mrs. Akey it had no reason to believe that she was acting on behalf of others. Consequently, the Board found no Section 8(a)(1) violation.

Petitioner contends in this court that (1) the employer had knowledge of the concerted nature of Mrs. Akey's activities before her discharge was accomplished, and (2) an employer violates Section 8(a)(1) by discharging an employee for concerted activities,

[3] *National Labor Relations Board v. Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, at 988 [14 LC ¶ 64,594] (7th Cir. 1948). "[E]mployees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated." *Ohio Oil Co.*, 92 N. L. R. B. 1587.

even though the employer had no knowledge of the concerted nature of such activities.

In the view we take of this case, we need not attempt to give categorical answers to these contentions. We may assume, without deciding, that as a general rule the employer must have prior knowledge of the concerted nature of the activity in order to violate Section 8(a)(1). But even assuming that the rule announced by the Board is generally valid, we think it should not be applied in full strictness and severity to a case like the present, in which the employee's claim of having acted in concert with others is made known to the employer contemporaneously with the discharge, and where the reasonableness and probable soundness of the claim is supported by the background and surrounding circumstances. Even assuming that before calling in Mrs. Akey for dismissal the employer had no reason to believe that her second letter was written on behalf of a group of employees, it was put on notice of her claim to that effect at the time of the firing episode. The following circumstances appearing of record would tend to show that the claim was valid, or at least worthy of fair consideration: (1) Mrs. Akey was known as a leader among the employees, and at an earlier period had unsuccessfully sought to unionize them; (2) the employer suspected that Mrs. Akey had written the first letter, dated July 2, which on its face represented concerted activity, and to which the second letter was in the nature of a reiteration or follow-up; (3) the employer was told by Mrs. Akey a few second after the words of

discharge were uttered that she had written the second letter for other employees as well as herself; and (4) nothing in this record indicates that the company's representative took any action toward terminating Mrs. Akey's employment other than to tell her orally of the termination—no one had left the room and no other operative facts had occurred. Under these circumstances, the employer's good faith, and the fairness and reasonableness of its conduct, became vital issues.[1] We are not attempting to decide those issues one way or the other. But we do not think the Board could properly dispose of the matter by simply concluding—in effect—that all that counted was what the employer knew or should have known before the precise moment when the words of discharge were pronounced.

It will thus be seen that we agree with the Board's conclusion that Mrs. Akey's conduct with respect to the second letter was concerted activity, but disagree as to the manner in which the Board's general rule as to employer knowledge was applied. One further issue remains, however—whether Mrs. Akey's conduct with respect to that letter was "protected," a matter on which the Board expressly declined to rule. Whether an activity is protected or not depends not only on the wording and purposes of the Act, but on the precise nature and effect of the employee's conduct. The question is accordingly one for the Board to decide in the first instance, and we express no opinion on

[1] One pertinent fact is that Mrs. Akey, when asked the names of those in concert with her, declined to answer. But we do not think this conclusively shows that the employer acted in good faith.

the subject at the present stage. No doubt, however, the Board will wish to consider whether Mrs. Akey's second letter contained false information, and, if so, whether the falsehoods were such as to remove the writing from any "protected" status it might otherwise possess.

For the foregoing reasons, we will remand the case to the Board for further proceedings not inconsistent with this opinion.

MILLER, Ch. J., dissents.